

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: **English**

No.: **ICC-02/04-01/15**

Date: **15 March 2019**

**TRIAL CHAMBER IX**

**Before: Judge Bertram Schmitt, Single Judge**

**SITUATION IN UGANDA**

**IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN***

**Public**

**Decision on Defence Request for Leave to Appeal a Decision on Disclosure of a  
Defence Experts' Report**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

**The Office of the Prosecutor**

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**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the Defence**

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Judge Bertram Schmitt**, acting as Single Judge on behalf of Trial Chamber IX of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 82(1)(d) of the Rome Statute ('Statute') and Regulation 23 *bis* of the Regulations of the Court issues the following 'Decision on Defence Request for Leave to Appeal a Decision on Disclosure of a Defence Experts' Report'.

## **I. Procedural history**

1. On 13 February 2019, the Office of the Prosecutor (the 'Prosecution') requested that the Defence be ordered to disclose a report (the 'Report') which was produced by two Defence expert witnesses upon request of the Defence.<sup>1</sup>
2. On 6 March 2019, the Single Judge granted the Prosecution request, ordering the Defence to disclose the Report (the 'Impugned Decision').<sup>2</sup>
3. On 12 March 2019, the Defence requested leave to appeal the Impugned Decision (the 'Request').<sup>3</sup> It seeks leave to appeal on the issue '[w]hether the Report, under the present factual circumstances, is exempted from the Defence disclosure obligations' (the 'Issue').<sup>4</sup>
4. The Defence submits that the Issue arises from the legal basis employed in the Impugned Decision<sup>5</sup> and argues that it 'created further uncertainty' since the Defence is unsure of its future disclosure obligations.<sup>6</sup>
5. The Defence further argues that the 'reasoning [in the Impugned Decision] is unfair and prejudicial to Mr Ongwen' since it 'misrepresents the circumstances leading to the order'.<sup>7</sup> It then submits four reasons in support of this alleged misrepresentation.<sup>8</sup>

<sup>1</sup> Prosecution's Request for Disclosure of the Third Report by Defence Experts, ICC-02/04-01/15-1446-Conf (with confidential annex A). A public redacted version of the request and the annex were filed on 14 February 2019.

<sup>2</sup> Decision on Prosecution Request for Disclosure of a Report produced by Defence Experts, ICC-02/04-01/15-1475.

<sup>3</sup> Defence Request for Leave to Appeal 'Decision on Prosecution Request for Disclosure of a Report produced by Defence Experts' (ICC-02/04-01/15-1475), notified 6 March 2019, ICC-02/04-01/15-1478-Conf.

<sup>4</sup> Request, ICC-02/04-01/15-1478-Conf, para. 2.

<sup>5</sup> Request, ICC-02/04-01/15-1478-Conf, paras 7-11.

<sup>6</sup> Request, ICC-02/04-01/15-1478-Conf, paras 12, 26-28.

<sup>7</sup> Request, ICC-02/04-01/15-1478-Conf, para. 15.

<sup>8</sup> Request, ICC-02/04-01/15-1478-Conf, paras 16-25.

6. The Defence further requests that the decision on the Request be issued by the full Trial Chamber.<sup>9</sup>
7. On 15 March 2019, the Office of the Prosecutor submitted its response, seeking that the Request should be rejected.<sup>10</sup>

## II. Submissions and analysis

8. As a preliminary matter, the Single Judge notes that the Request has no public-redacted version. As done previously, the Defence is ordered to provide a public-redacted version within 3 days of notification of this decision.
9. As stated on a previous occasion,<sup>11</sup> the decision on the Request will be a Single Judge Decision since the Impugned Decision was also issued by the Single Judge. The Defence does not provide any compelling reason to do otherwise.
10. The Single Judge recalls the interpretation of Article 82(1)(d) of the Statute as set out in detail previously.<sup>12</sup>
11. The Issue, as formulated by the Defence, is just a mere repetition of the exact question on which the Impugned Decision had to rule: whether the Defence must disclose the Report.
12. The Defence makes no effort to formulate an issue which would provide a *discrete* issue for the resolution of the Appeals Chamber. The argument that its Issue arises from the applied provisions in the Impugned Decision is misleading in the sense that, since the Issue is just a reformulation of the entire decision, it must necessarily be based on the applied law.
13. The argument that the Impugned Decision creates uncertainty since the Defence is not able to determine what it is supposed to disclose in the future is not an argument that supports its contention that there is an appealable issue in the sense of Article 82(1)(d) of

<sup>9</sup> Request, ICC-02/04-01/15-1478-Conf, para. 4.

<sup>10</sup> Prosecution's Response to "Defence Request for Leave to Appeal 'Decision on Prosecution Request for Disclosure of a Report produced by Defence Experts' (ICC-02/04-01/15-1475), notified 6 March 2019", ICC-02/04-01/15-1481-Conf.

<sup>11</sup> Decision on Defence Request for Leave to Appeal the Decision in Response to an Article 72(4) Intervention, 26 June 2016, ICC-02/04-01/15-1290.

<sup>12</sup> Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 2 September 2016, ICC-02/04-01/15-529, paras 4-8; Decision on Defence Request for Leave to Appeal the Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b), ICC-02/04-01/15-1331, para. 8.

the Statute. It relates more to whether the issue significantly affects the fair and expeditious conduct of the proceedings. The Single Judge notes in this regard, however, that the alleged uncertainty does not immediately affect the fair and expeditious conduct of the present proceeding as there is always the possibility of making a request to the Chamber in case of future disagreements on disclosure obligations.

14. The alleged ‘misrepresentation of facts’ further shows that the Defence continues to merely re-litigate the Impugned Decision. The initial event that triggered the production of the Report<sup>13</sup> was mentioned in the Impugned Decision<sup>14</sup> and the fact that the Defence did not (yet) decide whether it wishes to use the Report for purposes of trial<sup>15</sup> was also acknowledged. The Impugned Decision clearly states that this was not dispositive for its outcome.<sup>16</sup> Accordingly, there is no misrepresentation with regard to these two points: the Single Judge was aware of them and took them into consideration in his ruling.
15. The other two points<sup>17</sup> are raised for the first time in the Request and are additional arguments as to why the Report should not be disclosed. As stated in previous decisions,<sup>18</sup> the parties cannot supplement their initial filings during the request for leave to appeal with new arguments in order to extend their initial submissions. Further, the Defence misstates the email sent by the Chamber on 28 January 2019.<sup>19</sup> The Chamber noted in the email that the Defence had to make the Report available to the other participants if it intended to use the information within it in the future. No statement was made on the general obligation to disclose the Report should it be requested by the opposing party.
16. Consequently, the Single Judge finds that the Issue is not an appealable issue under Article 82(1)(d) of the Statute and the Request is a mere disagreement with the Impugned Decision. Accordingly, the Request is rejected.

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<sup>13</sup> Request, ICC-02/04-01/15-1478-Conf, para. 16.

<sup>14</sup> Impugned Decision, ICC-02/04-01/15-1475, para. 1.

<sup>15</sup> Request, ICC-02/04-01/15-1478-Conf, paras 20-22.

<sup>16</sup> Impugned Decision, ICC-02/04-01/15-1475, para. 13.

<sup>17</sup> Request, ICC-02/04-01/15-1478-Conf, paras 17-25.

<sup>18</sup> See, Decision on Request for Leave to Appeal the Decision on Defence Request for Disclosure of Certain RFAs and Related Items, 14 February 2018, ICC-02/04-01/15-1179, para. 7.

<sup>19</sup> Request, ICC-02/04-01/15-1478-Conf, para. 23.

**FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY**

**ORDERS** the Defence to file a public-redacted version of its Request under the conditions specified in paragraph 8; and

**REJECTS** the Request.

Done in both English and French, the English version being authoritative.

  
**Judge Bertram Schmitt, Single Judge**

Dated 15 March 2019

At The Hague, The Netherlands